Motion to Dismiss Appeal 6

[illegible] OF RECORD.

[illegible] OF THE UNITED STATES,

[illegible]

[illegible] S. MORGAN,
[illegible]

[illegible]

SUPREME COURT OF THE UNITED STATES.

No. 266.

THE UNITED STATES EX REL. SAMUEL C. MORGAN, PLAINTIFF IN ERROR,

vs.

EGBERT GATES, TOWN CLERK OF THE TOWN OF BELOIT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

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1 Circuit court of the United States of America, for the district of Wisconsin.

THE UNITED STATES OF AMERICA, *ex. rel.* Samuel C. Morgan,
vs.
EGBERT GATES, town clerk of the town of Beloit.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, on the first Monday of January, A. D. 1861, at the city of Milwaukee, in said district of Wisconsin, present and presiding the Hon. Andrew G. Miller, district judge. On the third day of the term, to wit, on the ninth day of January, A. D. 1861, the following proceedings were had, to wit:

SAMUEL C. MORGAN,
vs.
THE TOWN OF BELOIT. } Assumpsit.

Be it remember that heretofore, to wit, on the twenty-second day of December, A. D. 1860, the above-named plaintiff, by Messrs. Carpenter & Gridley, filed in the office of the clerk of the district court of the United States, for the district of Wisconsin, his præcipe for a summons, in the words and figures following, to wit:

Præcipe for summons.

District court of the United States for the district Wisconsin.

SAMUEL C. MORGAN,
vs.
THE TOWN OF BELOIT.

DISTRICT OF WISCONSIN, *ss:*

To the clerk of said court, issue summons, assumpsit, in above-entitled action, returnable at the January term, 1861, in assumpsit; damages two thousand dollars.

Dec. 22d, 1860.

CARPENTER & GRIDLEY,
Att'ys for Pl'ff.

Whereupon, a summons issued in the words and figures following, to wit:

Summons.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the marshal of the District of Wisconsin, greeting:

You are hereby commanded to summon the town of Beloit to appear before the district court of the United States of America for the

district of Wisconsin, aforesaid, at Milwaukee, on the first Monday of January ensuing, then and there to answer unto Samuel C.
2 Morgan in a plea of trespass on the case on promises, to his damage two thousand dollars, which shall then and there be made to appear. And of this writ make due return.

Witness the Hon. Andrew G. Miller, judge of the said district court of the United States, at the city of Milwaukee, in the said district of Wisconsin, this twenty-second day of December, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fifth.

[SEAL.] J. M. MILLER, *Clerk.*

CARPENTER & GRIDLEY, *Attorneys.*

Return.

And afterwards, on the 27th day of December, 1860, came the marshal and made return of the summons, endorsed thereon, as follows, to wit: "Served on the within-named town of Beloit, by showing Perry Bostwick, the clerk of said town, this summons, and delivering him a copy thereof, this 26th day of December, 1860.

J. H. LEWIS, *Marshal.*
By A. ROGERS, *Deputy.*

Fees, $7 24.

And afterwards, on the same day, came the plaintiff, by his attorneys, and filed his declaration in the words and figures following, to wit:

Declaration.

District court of the United States, for the district of Wisconsin, of the January term, A. D. 1861.

DISTRICT OF WISCONSIN, *ss:*

Samuel C. Morgan, who is a citizen of the State of Connecticut, plaintiff in this suit, by Carpenter & Gridley, his attorneys, complains of the town of Beloit, a corporation created and existing by and under the laws of the State of Wisconsin, defendant in this suit, of a plea of trespass on the case upon promises. For that, whereas the said defendant heretofore, to wit, on the 21st day of May, 1853, by authority granted to it by the legislature of the State of Wisconsin, by chapter twelve of the private laws of said State, A. D. 1853, approved February 10, 1853, and entitled "An act to authorize the town of Beloit to aid in the construction of a certain railroad from the city of Racine to the village of Beloit," did make, issue, and deliver to the Racine, Janesville and Mississippi Railroad Company the bonds of the said defendant, to the amount in all of one hundred thousand dollars, partly in sums of one thousand dollars each, and partly in sums of five hundred dollars each, in and by which said bonds the said defendant agreed and promised to pay the said railroad company, or to the holder, meaning bearer of said bonds re-

spectively, the said several sums of one thousand and five hundred dollars, mentioned in said bonds respectively, together with interest thereon, at the rate of 7 per cent., payably annually on the 10th day of February in each year thereafter, until February 10th, A. D. 1873, when the principal sum mentioned in said bonds respectively became due and payable, said interest to be paid on presentation of certain coupons or interest warrants to said bonds respectively attached, which coupons or interest warrants were an agreement on the part of the defendant to pay the several payments of interest on said bond to become due by its terms, as the same should become due, there being one coupon for each payment of interest on
3 said bond, and that said bonds were of the tenor following, except numbers, amounts which were different in different bonds, that is to say:

By special authority of the State legislature. United States of America, town of Beloit, State of Wisconsin.

No. 96. $500. The town of Beloit acknowledge themselves to owe the Racine, Janesville and Mississippi Railroad Company the sum of five hundred dollars for five shares, of one hundred dollars each, in the capital stock of said company, subscribed for and purchased of said company by said town, which sum said town promise to pay to said company, or to the holder thereof, at their office in the city of New York, on the 10th day of February, 1873, and also interest thereon, at the rate of seven per centum per annum, payable annually on the tenth day of each February, ensuing the date hereof, until the said principal sum shall be paid on presentation of the annexed interest warrant at said office. And it is further agreed that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special endorsement, or by delivery, as if the same were a note of hand payable to bearer.

In testimony whereof, the board of supervisors of said town have caused to be affixed its corporate seal and these presents to be subscribed by their chairman, and attested by the clerk thereof, this 21st day of May, 1853.

[L. S.] JOHN EASTERLY,
Chairman.

Attest:
M. V. PASCO, *Clerk.*

I, M. V. Pasco, clerk of the town of Beloit, do hereby certify that the following obligation is issued in pursuance of a special act of the legislature of the State of Wisconsin, entitled "An act to authorize the town of Beloit to aid in the construction of a certain railroad from the city of Racine to the village of Beloit," approved February 10th, 1853, and sanctioned by a majority of the legal voters of said town, at an election held for such purpose, April 7, 1853.

M. V. PASCO.

That the said plaintiff is the holder and owner of coupons which were attached to said bonds, of which the following are copies, and which have been duly presented at the proper time for payment at the office of said railroad company, being the Racine and Mississippi Railroad Company, in the city and State of New York, and payment thereof refused, that is to say:

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 31, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 31, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th
4 day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 32, issued to said company

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 32, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 33, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mis-

sissippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 33, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 34, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 34, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 40, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 40, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit, will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being interest due on that day on the bond of said town, number 41, issued to said town.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation

hereof, being the interest due that day on the bond of said town, number 41, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

5 $70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 35, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 35, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 36, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 36, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 37, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 37, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit, will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 38, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit, will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 38, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on pre-
6 sentation hereof, being the interest due that day on the bond of said town, number 39, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 39, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

And that the plaintiff is now the holder, owner, and bearer of each and every of said coupons, and that the same are due, and the said defendant refuses to pay the same, though often requested.

And also—

For that, whereas, the said defendant, on the 21st day of May, in the year one thousand eight hundred and fifty-three, at the city of Beloit, in said district, was indebted to the said plaintiff in the sum of nineteen hundred dollars, lawful money of the United States of America, for the work and labor, care and diligence of said plaintiff, by the said plaintiff, before that time done, performed, and bestowed in and about the business of the said defendant, and for the said defendant, and at the special instance and request of the said defendant, and also for divers materials, and other necessary things by the said plaintiff found, provided, used, and applied in and about that work, at the special instance and request of the said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the

said plaintiff, well and truly to pay unto the said plaintiff, the sum of money last mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of said defendant, done, performed, and bestowed divers other work and labor, care and diligence, in and about the business of said defendant, and for the said defendant, and had before that time, found, provided, used, and applied divers other materials, and other necessary things, in and about that business, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay the said plaintiff so much money as the said plaintiff reasonably deserved to have of the said defendant, for the same, when the said defendant should be thereunto afterwards requested; and the said plaintiff aver that the said plaintiff therefore reasonably deserves to have of the said defendant for the same the further sum of nineteen hundred dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, indebted to the said plaintiff in the sum of nineteen hundred dollars, of like lawful
7 money as aforesaid, for divers goods, wares, and merchandise, by the said plaintiff before that time sold and delivered to the said defendant, and at the like request of the said defendant; and in the further sum of nineteen hundred dollars of lawful money, as aforesaid, for so much money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant; and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there found to be in arrear and indebted to the said plaintiff in the further sum of nineteen hundred dollars of like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised

the said plaintiff, well and truly to pay unto said plantiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, although often requested, &c., has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff, the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of two thousand dollars, and therefore the said plaintiff brings suit, &c.

CARPENTER & GRIDLEY,
Plaintiff's Attorney.

To the within defendants:

Take notice, that on the trial of this action the plaintiff will give in evidence, under the money counts of this declaration, the coupons, copies of which are contained in the first count of this declaration.

CARPENTER & GRIDLEY,
Att'ys for Pl'ff.

And afterwards, on the 8th day of January, 1861, came the defendant, by Mr. Knowlton, its attorney, and filed its plea in the words and figures following, to wit:

8 *Plea.*

District court of the United States, for the district of Wisconsin.
January term, 1861.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT.

And the said town of Beloit comes and says, that this court ought not to have or take further cognizance of the action aforesaid, because it saith that the said The town of Beloit, is not a State of the United States of America, nor is it a citizen of the State of Wisconsin, nor is it a citizen of any other State of the United States, than the State of Wisconsin, nor is it a foreign state, nor is it a citizen, or subject of any foreign state, nor is it an ambassador or other public minister or consul, nor is it a corporation aggregate having capital stock or stockholders, nor is it any person whomsoever, a stockholder of said town of Beloit, nor can any person whomsoever become a stockholder of the said town of Beloit, but the said town of Beloit is a governmental public body, and part of the State of Wisconsin, established and continued by legislative enactment of said State of Wisconsin solely for local governmental purposes. And this the said town of Beloit is ready to verify. Wherefore it prays judgment whether this court can or will take further cognizance of the action aforesaid.

JAMES H. KNOWLTON,
Att'y for the town of Beloit.

STATE OF WISCONSIN, *Rock county, ss:*

On this seventh day of January, in the year of our Lord one thousand eighteen hundred and sixty-one, came before me, David Merrill, and made oath that he had heard read the foregoing plea of the town of Beloit and knows the contents thereof, and that said plea is true in substance and matter of fact. And further, that he was and he is the chairman of the supervisors of the town of Beloit, in the county of Rock and State of Wisconsin.

DAVID MERRILL.

Sig.: H. S. CONGER, *Com'r. Dist. Court U. S., Dist. of Wis.*

I hereby certify, that in my opinion the foregoing plea of the town of Beloit is well founded.

Dated, January 7th, 1861.

JAMES H. KNOWLTON,
Att'y and counsel for the town of Beloit.

9 *Clerk's report of am't due.*

District court of the United States of America, for the district of Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } No. 152, Jan. term, 1861.

I, John M. Miller, clerk of the district court of the United States of America, for the district of Wisconsin, do hereby report, that in pursuance of an order of this court refering to me to ascertain and report the amount due the plaintiff, I have assessed the damages to the plaintiff at the sum of one thousand five hundred and forty dollars.

J. M. MILLER, *Clerk.*

Damages, $1,540 00.
Dated, Jan. 9th, 1861.

THE UNITED STATES OF AMERICA,
District of Wisconsin, ss:

District court of the United States of America, for the district of Wis.

Pleas before the Honorable Andrew G. Miller, judge of the district court of the United States, for the district of Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } No. 152, Jan. term, 1861. Assumpsit.

DECEMBER 22, 1860.

This day came the plaintiff, by his attorneys, Messrs. Carpenter & Gridley, and filed his præcipe for a summons in a plea of trespass on the case on promises, damages $2,000.

Whereupon a summons issued, returnable the first Monday of January next. Summons returned: "Served on the within named town of Beloit, by showing Perry Bostwick, the clerk of said town, this summons and delivering him a copy thereof, this 26th day of December, 1860. J. H. Lewis Marshal, by A. Rogers, deputy." Fees, $7 24.

DECEMBER 27, 1860.

This day came the plaintiff, by his attorneys, and filed his declaration.

JANUARY 8, 1861.

This day came the defendant, by its attorney, Mr. Knowlton, and filed its plea.

At a stated term of the district court of the United States of America, for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, on the 1st Monday (being the seventh day) of January, A. D. 1861. Present, the Honorable Andrew G. Miller, judge of the said court, presiding.

Plea struck off—and judgment.

On the third day of said term, to wit, on the ninth day of January, A. D. 1861, the following proceedings were had, to wit:

This day came the plaintiff, by his counsel, and on his motion, it is ordered by the court that the paper filed by the defendants' counsel as a plea, be and hereby is stricken from the files as a nullity, and that the default of the defendant be, and is hereby, entered for its not pleading to the plaintiff's declaration herein filed, and that it be referred to the clerk to ascertain and report what sum the plaintiff ought to recover for his damages. The clerk reported in writing that he assessed the damages to the said plaintiff at the sum of one thousand five hundred and forty dollars.

Whereupon, it is considered and adjudged by this court now here, that the said plaintiff do have and recover of the said defendant, the town of Beloit, the said sum of one thousand five hundred and forty dollars, with twenty-five dollars and seventy-four cents, his costs about his said suit in his behalf by him expended, and that he have execution therefor.

Damages	$1,540 00
Costs	25 74
	$1,565 74

Judgment roll signed January 9th, A. D. 1861.

J. M. MILLER, *Clerk.*

Proof of service on supervisors of transcript.

And afterwards, to wit, at a term of said court, begun on the 1st Monday of January, 1862, and on the eighth day of said term, to wit,

on the 15th day of January, A. D. 1862, the following proceedings were had, to wit:

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } At law.

This day came the plaintiff, by his counsel, and made proof, as herein filed, of the service of a transcript of this judgment and demand upon Charles Peck and Simon Ruble, supervisors of said town of Beloit, and upon P. Bostwick, the clerk of said town, to levy a tax for the payment of this judgment, and that the same has not been done, which said proof is as follows, to wit:

District court of the United States of America, for the district of Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT.

Judgment rendered for the plaintiff for the sum of $1,540 00
Cost taxed at 25 74
Judgment docketed Jan. 9, 1861, at five o'clock, p. m.

CARPENTER & GRIDLEY,
Plaintiff's Attorneys.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, John M. Miller, clerk of the district court of the United States of America, for the district of Wisconsin, do hereby certify that I have compared the foregoing with the original "docket," now of record in my office, and that it is a correct transcript therefrom and the whole thereof, in a certain action wherein Samuel C. Morgan is plaintiff and the town of Beloit is defendant.

11 In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-sixth.

[SEAL.] J. M. MILLER, *Clerk.*

STATE OF WISCONSIN, *Milwaukee county, ss:*

Henry S. Durand, being duly sworn on oath, says that he is president of the Racine and Mississippi Railroad Company, and has been since the 1st day of February, A. D. 1853, and has been and is perfectly conversant with its pecuniary condition and business affairs since the day and year last aforesaid; and he further says, that there never has been any dividend declared on the stock of said company,

and that said company's said railroad is now in the hands of its mortgagees.

H. S. DURAND.

Subscribed and sworn to before me this 2d day of December, A. D. 1861.

THOS. THOMAS,
Notary Public for Milwaukee Co., Wis.

STATE OF WISCONSIN, *Rock county, ss:*

To Charles Peck, chairman, and Simon Rublee, supervisors of the town of Beloit:

The undersigned, who recovered judgment, as stated in the annexed transcript, upon certain coupons attached to bonds of the town of Beloit, issued by said town under the provisions of an act of the legislature, entitled "An act to authorize the town of Beloit to aid in the construction of a certain railroad from the city of Racine to the village of Beloit," approved February 10th, 1853, which coupons are particularly described in the record of said judgment, respectfully asks the board of supervisors of the town of Beloit immediately levy a tax upon the taxable property of said town sufficient to pay said judgment.

Dated December 2d, 1861.

SAMUEL C. MORGAN,
By CARPENTER & GRIDLEY,
His Attorneys.

STATE OF WISCONSIN, *Milwaukee county, ss:*

Matt. H. Carpenter, being first duly sworn on oath, says that the above-mentioned judgment was rendered on coupons as stated in the above petition.

MATT. H. CARPENTER.

Subscribed and sworn to before me this 2d day of December, A. D. 1861.

GEO. COGSWELL,
Notary Public, State of Wisconsin, Mil. Co.

DISTRICT OF WISCONSIN,
State of Wisconsin, Rock county, ss:

I, E. J. Smith, being first duly sworn on oath, say that on the 26th day of December, A. D. 1861, I delivered to Simon Ruble and Charles Peck, within named, of Beloit, each a duplicate of the foregoing transcript, affidavits of Durand and Matt. H. Carpenter, and demand of said Samuel C. Morgan, and left the same with each of said persons; that Charles Peck af's'd is chairman of the board of supervisors, and said Simon Ruble is supervisor of said town, and that Jeremiah Roberts, who was elected at the same time a supervisor with said Peck and Ruble, has removed from said town of Beloit.

I further say that on the day of January, A. D. 1862, I
12 enquired of said town clerk, and of said Peck and said Ruble, whether the foregoing demand had been complied with by the board of supervisors of said town, and was told by each of them that it had not been, and that no tax had been levied as within demanded.

E. J. SMITH.

Subscribed and sworn to before me this 3d day of January, A. D. 1862.

J. C. CONVERSE,
Notary Public.

DISTRICT OF WISCONSIN,
State of Wisconsin, Rock county, ss:

I, L. C. Lawton, being first duly sworn on oath, say that on the 12 day of December, 1861, I delivered to P. Bostwick, town clerk of the town of Beloit, a duplicate of the annexed transcript, affidavits of H. S. Durand and M. H. Carpenter, and demand of S. C. Morgan, and left the same with said Bostwick.

L. C. LAWTON.

Subscribed and sworn to before me this 4th day of January, 1862.

J. C. CONVERSE,
Notary Public, Wis.

Order of court allowing mandamus.

And on said proof, and on motion of said plaintiff, by his counsel, it is ordered by the court that a mandamus do issue against said Charles Peck and Simon Ruble, the supervisors, and P. Bostwick, the clerk of the town of Beloit, commanding that they proceed without delay to levy and collect a tax for the payment of this judgment. Whereupon a mandamus issued, as follows:

Mandamus.

THE UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America to Charles Peck and Simon Ruble, supervisors, and P. Bostwick, town clerk of the town of Beloit, greeting:

[SEAL.] Whereas, Samuel C. Morgan, lately in the district court of the United States of America for the district of Wisconsin, on the ninth day of January, A. D. 1861, recovered a judgment against the town of Beloit for the sum of one thousand five hundred and forty dollars, and twenty-five dollars and seventy-four cents costs.

Nevertheless, you, the said Charles Peck and Simon Ruble,
13 supervisors, and P. Bostwick, town clerk of said town of Beloit, have neglected to levy and collect a tax for the payment

of the same, as we are informed by his complaint, which we have adjudged to be true and as appears of record.

Now, therefore, we being willing that speedy justice should be done in this behalf to him, said Samuel C. Morgan, we do command and enjoin that without delay, upon the receipt of this writ, you levy upon the taxable property of said town of Beloit a tax, and collect the same, for the payment of said judgment, with interest and costs.

Witness, the Honorable Andrew G. Miller, judge of the district court of the United States of America for the district of Wisconsin, at the city of Milwaukee, in said district, this fifteenth day of January, A. D. 1862, and of our independence the eighty-sixth.

J. M. MILLER, *Clerk.*

Return.

Mandamus returned: "Served on the within named Charles Peck and Samuel Ruble, supervisors, and P. Bostwick, town clerk, by showing them this writ, and delivering to each a copy thereof, this 12th day of February, 1862.

"D. C. JACKSON, *Marshal,*
"By JOHN A. PERRY, *Deputy.*"

Fees, $12 90.

And afterwards, to wit, on the 18th day of said term, to wit, on the 13th day of March, A. D. 1862, the following proceedings were had, to wit:

Motion to vacate mandamus.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } At law.

This day came the defendant's counsel, and moved the court, on affidavits filed, to vacate and set aside the writ of mandamus issued in this cause, which said motion and affidavits are as follows, to wit:

U. S. district court, district of Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT.

SIR: You will please take notice that upon the affidavits
14 hereto annexed we shall apply to this court on the 13th day of March, A. D. 1862, at the opening of the court on that day, for an order vacating and setting aside the writ of mandamus issued in the above-entitled action, on the fifteenth day of January, A. D. 1862, directed to Charles Peck and Simon Ruble, supervisors, and P. Bostwick, town clerk of the town of Beloit, commanding them to levy and collect a tax to pay the judgment in said action, for the reason

that said Charles Peck was not at the time said writ was issued, and is not a supervisor of the town of Beloit, and that Simon Ruble and P. Bostwick have no power to levy and collect such tax.

KNOWLTON & JACKSON,
Att'ys for Def't.

And PECK, RUBLE, & BOSTWICK,
CARY & PRATT, *Of Counsel.*

Affidavit of Charles Peck.

District court of the United States for the district of Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT.

ROCK COUNTY, *ss:*

I, Charles Peck, of lawful age, and resident of the county of Rock, and State of Wisconsin, being first duly sworn, depose and say, that on or about the twelfth day of February, in the year of our Lord eighteen hundred and sixty-two, a writ of mandamus was served upon me in said county of Rock, in the action above entitled, of which the following is a copy, that is to say:

"UNITED STATES OF AMERICA,
District of Wisconsin:

"The President of the United States of America to Charles Peck and Simon Ruble, supervisors, and P. Bostwick, town clerk of the town of Beloit, greeting:

"[L. S.] Whereas, Samuel C. Morgan, lately in the district court of the United States of America for the district of Wisconsin, on the ninth day of January, A. D. 1861, recovered a judgment against the town of Beloit for the sum of one thousand five hundred & forty dollars, and twenty-five dollars and seventy-four cents costs.

"Nevertheless, you the said Charles Peck and Simon Ruble, supervisors, and P. Bostwick, town clerk of said town of Beloit, have neglected to levy and collect a tax for the payment of the same, as we are informed by his complaint, which we have adjudged to be true as appears of record.

15 "Now, therefore, we being willing that speedy justice should be done in this behalf to him, said Samuel C. Morgan, we do command and enjoin that without delay, upon the receipt of this writ, you levy upon the taxable property of said town of Beloit a tax, and collect the same, for the payment of said judgment, with interest and costs.

"Witness, the Honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin, at the city of Milwaukee, in said district, the fifteenth day of January, A. D. 1862, and of our independence the eighty-sixth.

"J. M. MILLER."

I further depose and say, that at the annual town meeting, held in said town of Beloit, in the month of April, in the year of our Lord eighteen hundred and sixty-one, I was, by the votes of the electors of said town of Beloit, elected to the office of chairman of the board of supervisors of said town of Beloit, and that thereupon I qualified and took upon myself the discharge of the duties of said office, until the twenty-seventh day of November, in the year of our Lord eighteen hundred and sixty-one, on which last-named day I, in writing, resigned my said office of chairman of the board of supervisors of the town of Beloit aforesaid, and on the next day I filed my said resignation with the town clerk of said town of Beloit, and which resignation is in the words and figures, or to the effect following, that is to say:

"To the town clerk of the town of Beloit.

"I hereby give notice that I resign my office of chairman of supervisors of the said town of Beloit.

"Given under my hand this 27th day of Nov., 1861.

(Signed) "CHARLES PECK."

I further depose and say, that shortly after I, so as aforesaid, resigned my said office of chairman of the board of supervisors of the said town of Beloit, and on the thirty-first day of December, in the year of our Lord eighteen hundred and sixty-one, I removed with my family from the said town of Beloit to, and became a resident of the city of Beloit, in the said county of Rock, and State of Wisconsin.

I further depose and say, that since my resignation, as aforesaid, I have not exercised, nor have I attempted to exercise the said
16 office of supervisor of said town of Beloit, and I am advised, by counsel, that I have no right or power to exercise the said office so as aforesaid by me resigned, nor to do any act which by law a supervisor of a town within the said State of Wisconsin may, can, or should do.

I further depose and say, that on the same day on which I was, as aforesaid, elected to the office of chairman of the board of supervisors of said town of Beloit, one Jeremiah Roberts was elected a supervisor of the said town of Beloit, and that he qualified as such supervisor and entered upon the discharge of the duties of his said office, and that he continued to exercise the said office until the fourth day of November, in the year of our Lord eighteen hundred and sixty-one, on which day he removed from the said town of Beloit, and became a resident of the city of Janesville, in the said county of Rock, since which time the said Roberts has not exercised, or attempted to exercise the said office of supervisor of said town of Beloit.

I further depose and say, that the Simon Ruble, in the said writ of mandamus named, is at the present time the only supervisor of the said town of Beloit, and that since the time of my resignation as

aforesaid, he, the said Simon Ruble, has been the sole and only supervisor of the said town of Beloit. And further I say not.

CHARLES PECK.

Subscribed and sworn to before me, this third day of March, A. D. 1862.

H. S. CONGER,
Com'r dist. court U. S., dist. Wis.

Affidavit of Perry Bostwick.

U. S. district court, district of Wisconsin.

SAMUEL C. MORGAN
v.
THE TOWN OF BELOIT.

ROCK COUNTY, *ss:*

Perry Bostwick, of the town of Beloit, in the county of Rock, being duly sworn, says, that on the first day of November, A. D. 1861, he was, ever since has been, and still is the town clerk of the town of Beloit aforesaid; that for some time prior to the 27th day of November, A. D. 1861, one Chales Peck was one of the supervisors of said town of Beloit, and chairman of the board of supervisors of
17 said town; that on or about the 28th day of November, A. D. 1861, the said Charles Peck resigned his office of chairman of said board of supervisors of said town of Beloit, and on that day filed his resignation and the certificate thereof in the office of the town clerk of said town of Beloit, and that the same now remains on file and of record in said office.

This deponent further says, that on or about the first day of January, A. D. 1862, the said Charles Peck, removed from, and ceased to be a resident of the said town of Beloit aforesaid.

This deponent further says, that on the second day of April, A. D. 1861, one Jeremiah Roberts was duly elected a supervisor of the said town of Beloit, and that on or about the fourth day of November, A. D. 1861, the said Jeremiah Roberts removed from, and ceased to be a resident of said town of Beloit; and that Simon Ruble was, on the 29th day of November, A. D. 1861, and has ever since continued to be, and still is, the only supervisor in said town of Beloit. And further says not.

P. BOSTWICK.

Sworn and subscribed before me, this third day of March, A. D. 1862.

H. S. CONGER,
Com'r dist. court U. S. dist. Wis.

U. S. district court, district of Wisconsin.

Affidavit of Simon Ruble.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT.

ROCK COUNTY, *ss:*

Simon Ruble, of the town of Beloit, Rock county, Wisconsin, being duly sworn, says that on the second day of April, A. D. 1861, this deponent, Charles Peck, and Jeremiah Roberts were duly elected supervisors of said town of Beloit; that said Charles Peck was elected chairman of the board of said supervisors.

This deponent further says, upon information and belief, that on or about the fourth day of November, A. D. 1861, the said Jeremiah Roberts removed from and ceased to be a resident of said town of Beloit; that on the 28th day of November, A. D. 1861, the said Charles Peck duly filed his resignation as such supervisor in the office of the town clerk of said town of Beloit; that on or about the first day of January, A. D. 1862, the said Charles Peck removed from and ceased to be a resident of the town of Beloit, and that since the said 28th day of November, A. D. 1861, he has been, and still is, the only supervisor in said town of Beloit, and further says not.

SIMON RUBLE.

Subscribed and sworn to before me this third day of March, A. D. 1862.

H. S. CONGER,
Com'r dist. court, U. S. dist., Wisconsin.

JULY 10, 1862.

The following affidavits for attachment against Simon Ruble, filed this day, to wit:

Affidavits for attachment vs. Simon Ruble.

In district court of the United States for the district of Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT.

DISTRICT OF WISCONSIN, *ss:*

E. J. Smith, being first duly sworn on oath, says, that he did, at the town of Beloit, in said district, on the seventeenth day of March, A. D. 1862, examine, in the office of the town clerk of said town of Beloit the record of the proceedings of the board of supervisors of said town, to ascertain whether any tax had been levied by the said board of supervisors to pay the judgment in the above entitled action, or any part thereof, and found that there had been no such tax levied, as appeared by said record.

That on or about the twenty-eighth day of February, A. D. 1862, he enquired of Simon Ruble, one of the supervisors of the said town whether such tax had been levied by the board of supervisors of said town, and was by said Ruble then informed that it had not been. That on the seventeenth day of March, A. D. 1862, he enquired of Charles Peck, another of the supervisors of said town, and who is the chairman thereof, whether said tax had been levied, and was by him informed that it had not been. And deponent further says, that both the said Ruble and Peck reside with their respective families in the said town of Beloit.

E. J. SMITH.

Sworn to and subscribed before me this 18th day of March, 1862.
W. C. SPALDING, *Commissioner, &c.*

In district court of the United States, for the district of Wisconsin

SAMUEL C. MORGAN
vs.
19 THE TOWN OF BELOIT.

DISTRICT OF WISCONSIN, *ss:*

Theodore B. Wells, being first duly sworn on oath, says, that at the April election, April 1, 1862, Simon Ruble was elected chairman of the board of supervisors of said town, and that Nathan Stoddard and Ashael Henderson were elected supervisors at the election held in and for said town according to law, and that the said Simon Ruble did, on the fifth day of April, A. D. 1862, accept the said office, and qualified therefor and therein. And the said T. B. Wells further says, that on the 21st day of April, 1862, he did examine the records of the town of Beloit, at the office of the town clerk, and that the said N. Stoddard and Ashael Henderson had not filed their acceptance of said office nor qualified therefor.

THEODORE B. WELLS.

Subscribed and sworn to before me this 22d day of April, 1862.
D. W. C. CASTLE,
Court commissioner for Rock county.

NOVEMBER, 10, 1862.

Substitution of Mat. H. Carpenter, as plaintiff's attorney filed.

At a stated term of the circuit court of the United States of America for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the fifth day) of January, A. D. 1863. Present the Honorable Andrew G. Miller, district judge, presiding.

On the seventh day of the said term, to wit, on the twelfth day of January, A. D. 1863, the following proceedings were had, to wit:

Motion for attachment against Simon Ruble.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } At law.

This day came the plaintiff, by his counsel, and moved the court for an attachment against Simon Ruble, chairman of the board
20 of supervisors, for not levying a tax in pursuance of a mandamus for that purpose. Whereupon it is ordered by the court that this motion be heard on the first Monday of February next, and that notice be served on said Simon Ruble.

FEBRUARY 6, 1863.

A copy of said last mentioned order, duly certified by the clerk was filed this day, endorsed as follows, to wit:

"DISTRICT OF WISCONSIN, *ss:*

"I, E. J. Smith, being first duly sworn on oath, says that at the town of Beloit, in said district, on the 21st day of Jan'y, 1863, I delivered to Simon Ruble, within named, a duplicate certified copy of the within order or rule.

"E. J. SMITH."

Subscribed and sworn to before me this 22d day of January, 1863.
D. W. C. CASTLE, *Commissioner.*

20½ *Hearing of motion for attachment.*

FEBRUARY 9, 1863.

This day the motion of the plaintiff for an attachment against Simon Ruble, chairman of the board of supervisors of the town of Beloit, for not levying a tax to pay this judgment in pursuance of a mandamus for that purpose, came on to be heard and was argued by Mr. Carpenter for the plaintiff, and by Mr. Cary for defendant, when the court took time to consider of the matter.

Attachment denied.

MARCH 2, 1863.

This day came the parties, by their counsel, and on consideration of the application for an attachment against Simon Ruble, it is ordered by the court that an attachment be not granted.

Order on supervisors to show cause why mandamus should not issue.

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the fifth day) of January, A. D. 1863. Present the Honorable Andrew G. Miller, judge of said court, presiding.

On the fourteenth day of the said term, to wit, on the seventh day of May, A. D. 1863, the following proceedings were had, to wit:

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } At law.

This day came the plaintiff, by his counsel, and on his motion it is ordered by the court that the chairman of the board of supervisors, and the supervisors of said town of Beloit, constituting the board of supervisors of said town, show cause before this court, at the court room in the city of Milwaukee, on the second Monday of June next, why a peremptory mandamus should not issue, compelling said board of supervisors to levy a tax, according to law to pay the judgment, in favor of this plaintiff, rendered on the ninth day of January,
21 A. D. 1861, for fifteen hundred and forty dollars damages, and twenty-five dollars and seventy-four cents costs. And it is further ordered that a copy of this order be served on the said chairman, and each of said supervisors, at least ten days before said second Monday of June next.

JUNE 16, 1862.

Copy of said last order, duly certified by the clerk, with affidavit of service thereof endorsed thereon filed, which affidavit thereof is as follows, to wit:

Return of service of above order.

DISTRICT OF WISCONSIN, *ss:*

Wm. C. Ritchie, being first duly sworn, says, that at the town of Beloit, in said district, on the 18th day of May, 1863, he served this order or rule on Charles Peck, chairman of the board of supervisors of said town, and on Asahel Henderson and Simon Ruble, supervisors of said town, who, with said chairman, then constituted the board of supervisors of said town, by exhibiting to each of them this certified original, and leaving with each of them, at the same time and place, a true copy of this original.

W. C. RITCHIE.

Subscribed and sworn to before me this 19 day of May, 1863.
MATT. H. CARPENTER,
Notary public, Mil. co., Wis.

Answer of Charles Peck to said rule, filed as follows, to wit:

Answer of Charles Peck to order to show cause.

U. S. district court, district of Wisconsin.

SAMUEL C MORGAN,
vs.
THE TOWN OF BELOIT. }

JUNE 22, 1863.

The answer of Charles Peck, supervisor of the town of Beloit, defendant, respectfully shows, that at the annual town meeting of the

town of Beloit, held in said town in the month of April, A. D. 1863, Simon Ruble and Asahel Henderson were each of them duly elected supervisors of the said town of Beloit; that each of said persons, so elected as aforesaid, duly qualified as such officers, and entered upon the discharge of the duties of said office; that on or about the 14th day of April, A. D. 1863, and before the making or service of the order to show cause why a peremptory mandamus should not
22 be issued in this cause, the said Simon Ruble and Asahel Henderson, so elected supervisors, as aforesaid, each of them in and by an instrument in writing, by each of them subscribed and filed in the office of the town clerk of the said town of Beloit; resigned his office of supervisor of the said town of Beloit, and that at the time of the service of the said order to show cause upon him, the said Charles Peck, to wit, on the 18th day of May, A. D. 1863, he the said Charles Peck, was the only supervisor of the said town of Beloit, defendant, and that at the time of the service of said order to show cause upon the said Simon Ruble and Asahel Henderson, to wit, on the said 18th day of May, A. D. 1863, they, the said Simon Ruble and Asahel Henderson were not supervisors, nor was either of them a supervisor of the said town of Beloit, and from thence hitherto neither the said Simon Ruble, nor the said Asahel Henderson has been such supervisor; and the said Charles Peck further shows that he is advised by his counsel, and verily believes that he cannot, as such sole supervisor of the said town of Beloit, levy a tax to pay the judgment mentioned in the said order to show cause or levy a tax for any purpose whatsoever.

And the said Charles Peck, further answering, shows, that as such sole supervisor of the said town of Beloit, he had not, at any time, nor has he now any power or authority to levy a tax upon the taxable property of the said town of Beloit for any purpose whatever, or to pay the said judgment mentioned in the said order to show cause why a peremptory mandamus should not issue.

H. L. PALMER & E. G. RYAN,
Atty's for Respondent.

And afterwards, to wit, on the 24th day of said term, to wit, on the 23d day of June, A. D. 1863, the following proceedings were had, to wit:

Order discharging rule to show cause.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } At law.

This day the rule on the board of supervisors to show cause why a mandamus should not be issued against them to levy a tax for
23 the payment of this judgment came on to be heard, and it being shown by the answer filed that two of the board had resigned prior to the issuing and service of the rule, it is thereupon ordered by the court that the said rule be, and hereby is, discharged.

And afterwards, to wit, at a stated term of the circuit court of the United States of America, for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the second Monday (being the eighth day) of April, A. D. 1867, present the Honorable Andrew G. Miller, district judge, presiding. On the twentieth day of said term, to wit, on the third day of June, A. D. 1867, the following proceedings were had, to wit:

Petition for rule on town clerk to show cause.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } At law.

This day came the plaintiff, by his counsel, Mr. Carpenter, and presented his petition, with affidavits and papers as herein filed, for a rule on Egbert Gates, town clerk of the town of Beloit, to show cause why a mandamus should not be issued against him, compelling him to levy a tax to satisfy the judgment; which said petition is as follows:

Circuit court of the United States for the district of Wisconsin.

To the judges of said circuit court:

Your petitioner, Samuel C. Morgan, respectfully shows, that by the consideration and judgment of this honorable court, on the 9th day of January, A. D. 1861, he recovered a final judgment against the town of Beloit, for fifteen hundred and forty dollars damages, and twenty-five dollars and 74 cents costs; that said judgment remains in full force, wholly unpaid, and due from said town of Beloit to him.

Your petitioner further shows, that at the town of Beloit, in said district, on the 4th day of August, A. D. 1866, he caused to be filed in the office of George Morse, who was then town clerk of the said town of Beloit, against which town said judgment was rendered as aforesaid, an exemplified copy of said judgment, together
24 with the affidavit of Matt. H. Carpenter, his attorney, stating that said judgment had not been reversed, appealed from, nor removed to any other court, nor paid nor satisfied, in whole or in part, as appears by the affidavit of Lucius G. Fisher, and papers thereto attached, shown to the court and filed herewith.

Your petitioner further shows, on information and belief, which belief in part is founded upon an affidavit of E. J. Smith, shown to the court, and filed herewith, that no part of said judgment has been assessed by the town clerk of said town upon the taxable property of said town, although since the filing said papers in said town clerk's office, a town assessment and tax roll has been made and collected in said town.

Your petitioner begs leave to refer to the record of said judgment, and to the papers filed herewith in support of this petition.

Your petitioner further shows, on information and belief, that Eg-

bert Gates is now town clerk of said town of Beloit, duly elected and qualified.

Your petitioner, therefore, prays, that a peremptory writ of mandamus may be issued out of, and under the seal of this honorable court, in due form of law, directed to the town clerk of the said town of Beloit, strictly commanding him to proceed to assess the amount of said judgment, with interest from the date of such judgment, to the time when the warrant for the collection thereof will expire, upon the taxable property of the said town of Beloit, and place the same on the next town assessment and tax roll of said town, in a separate column; that the same proceedings may be had thereon, and the same be collected and returned in the same manner as other town taxes in said town, and be paid to your petitioner in satisfaction of said judgment.

MATT. H. CARPENTER,
Attorney for Sam'l C. Morgan.

DISTRICT OF WISCONSIN, *ss:*

Matt. H. Carpenter, being duly sworn, on oath, says, that he is the attorney of the said Samuel C. Morgan, and fully empowered to enforce the collection of the above and within-mentioned judgment, and that he has read the foregoing petition, and knows the contents thereof, and the same is true, of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

MATT. H. CARPENTER.

Subscribed and sworn to before me, this 18th day of May, A. D. 1867.

ALBERT KALVELAGE,
Notary Public.

And same day, (June 3, 1867,) the following notice to town clerk of Beloit, with transcript, affidavits, &c., filed:

STATE OF WISCONSIN, *Town of Beloit, ss:*

To the town clerk of the town of Beloit:

SIR: Herewith you are served with papers hereto attached, which please file in your office. Exhibit No. 1 is the duly certified transcript of a judgment rendered in favor of Samuel C. Morgan against the town of Beloit, in the district court of the United States for the district of Wisconsin, on the 9th day of January,. A. D. 1861.

Exhibit No. 2 is a duly certified copy of the record of said judgment, duly certified by the clerk of the circuit court of the United States for the district of Wisconsin.

Exhibit No. 3 is an affidavit that said judgment yet remains in full force, and unsatisfied, &c. Your attention is directed to the revised statutes of this State, chapter 15, section 78, page 186. And you will take notice, that the said Samuel C. Morgan, by Matt. H. Car-

penter, his attorney, hereby demands of you, that you proceed to assess the amount of said judgment, with interest from the date thereof to the time when the warrant for the collection thereof will expire, upon the taxable property of the town of Beloit, placing the same on the next town assessment and tax roll of said town, in a separate column, as required by said section; and you are hereby that in case you refuse or neglect so to do, you will be proceeded against personally by action for damages to the amount of said judgment.

Dated August 1, A. D. 1866.

SAMUEL C. MORGAN,
By MATT. H. CARPENTER,
His Attorney.

26 *Exhibit No.* 1.

Circuit court of the United States of America, for the ninth circuit and district of Wisconsin.

SAMUEL C. MORGAN, }
vs.
THE TOWN OF BELOIT. }

Judgment rendered for the plaintiff for the sum of.... $1,540 00
Cost taxed at..... 25 74
Judgment docketed January 9th, 1861, at five o'clock, p. m.

CARPENTER & GRIDLEY,
Plaintiff's Attorneys.

Marshal's fees on mandamus, $12 90.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America, for the eight circuit and district of Wisconsin, do hereby certify that I have compared the foregoing with the original "docket," now of record in my office, and that it is a correct transcript therefrom, and of the whole thereof, in a certain action wherein Samuel C. Morgan is plaintiff and the town of Beloit is defendant.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this thirty-first day of July, in the year of our Lord one thousand eight hundred and sixty-six, and of the independence of the said United States the ninety-first.

[SEAL.] A. SCOTT SLOAN, *Clerk.*
By JAMES McFARLIN, *Deputy.*

[5-ct. rev. stamp, cancelled.]

27 *Exhibit No. 2.*

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, Scott Sloan, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this 31st day of July, in the year of our Lord one thousand eight hundred and sixty-six, and of the independence of the said United States the ninety-first.

[SEAL.] A. SCOTT SLOAN, *Clerk.*
By JAMES McFARLIN, *Deputy.*

[5ct. rev. stamp, cancelled.]

28 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, on the first Monday of January, A. D. 1861, at the city of Milwaukee, in said district of Wisconsin. Present and presiding the Hon. Andrew G. Miller, district judge. On the third day of the term, to wit, on the ninth day of January, A. D. 1861, the following proceedings were had, to wit:

SAMUEL C. MORGAN,
vs.
THE TOWN OF BELOIT. } Assumpsit.

Be it remember that heretofore, to wit, on the twenty-second day of December, A. D. 1860, the above-named plaintiff, by Messrs. Carpenter & Gridley, filed in the office of the clerk of the district court of the United States, for the district of Wisconsin, his præcipe for a summons, in the words and figures following, to wit:

District court of the United States for the district Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT.

DISTRICT OF WISCONSIN, *ss:*

To the clerk of said court, issue summons, assumpsit, in above-entitled action, returnable at the January term, 1861, in assumpsit; damages, two thousand dollars.

Dec. 22d, 1860.

CARPENTER & GRIDLEY,
Att'ys for Pl'ff.

Whereupon, a summons issued in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the marshal of the District of Wisconsin, greeting:

You are hereby commanded to summon the town of Beloit to appear before the district court of the United States of America for the district of Wisconsin, aforesaid, at Milwaukee, on the first Monday of January ensuing, then and there to answer unto Samuel C.
29 Morgan in a plea of trespass on the case on promises, to his damage, two thousand dollars, which shall then and there be made to appear. And of this writ make due return.

Witness the Hon. Andrew G. Miller, judge of the said district court of the United States, at the city of Milwaukee, in the said district of Wisconsin, this twenty-second day of December, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fifth.

[SEAL.] J. M. MILLER, *Clerk*.

CARPENTER & GRIDLEY, *Attorneys.*

And afterwards, on the 27th day of December, 1860, came the marshal and made return of the summons, endorsed thereon as follows, to wit: "Served on the within-named town of Beloit, by showing Perry Bostwick, the clerk of said town, this summons, and delivering him a copy thereof, this 26th day of December, 1860.

J. H. LEWIS, *Marshal.*
By A. ROGERS, *Deputy.*

Fees, $7 24.

And afterwards, on the same day, came the plaintiff, by his attorneys, and filed his declaration in the words and figures following, to wit:

District court of the United States, for the district of Wisconsin, of the January term, A. D. 1861.

DISTRICT OF WISCONSIN, *ss:*

Samuel C. Morgan, who is a citizen of the State of Connecticut, plaintiff in this suit, by Carpenter & Gridley, his attorneys, complains of the town of Beloit, a corporation created and existing by and under the laws of the State of Wisconsin, defendant in this suit, of a plea of trespass on the case upon promises. For that, whereas the said defendant heretofore, to wit, on the 21st day of May, 1853, by authority granted to it by the legislature of the State of Wisconsin, by chapter twelve of the private laws of said State, A. D. 1853, approved February 10, 1853, and entitled "An act to authorize the town of Beloit to aid in the construction of a certain railroad from the city of Racine to the village of Beloit," did make, issue, and deliver to the Racine, Janesville and Mississippi Railroad Company

the bonds of the said defendant, to the amount in all of one hundred thousand dollars, partly in sums of one thousand dollars each, and partly in sums of five hundred dollars each, in and by which said bonds the said defendant agreed and promised to pay the said railroad company, or to the holder, meaning bearer of said bonds, respectively, the said several sums of one thousand and five hundred dollars, mentioned in said bonds respectively, together with interest thereon, at the rate of 7 per cent., payably annually on the 10th day of February in each year thereafter, until February 10th, A. D. 1873, when the principal sum mentioned in said bonds respectively became due and payable, said interest to be paid on presentation of certain coupons or interest warrants to said bonds respectively attached, which coupons or interest warrants were an agreement on the part of the defendant to pay the several payments of interest on said bond to become due by its terms, as the same should become due, there being one coupon for each payment of interest on
30 said bond, and that said bonds were of the tenor following, except numbers, amounts which were different in different bonds, that is to say:

By special authority of the State legislature. United States of America, town of Beloit, State of Wisconsin.

No. 96. $500. The town of Beloit acknowledge themselves to owe the Racine, Janesville and Mississippi Railroad Company the sum of five hundred dollars for five shares, of one hundred dollars each, in the capital stock of said company, subscribed for and purchase of said company by said town, which sum said town promise to pay to said company, or to the holder hereof, at their office in the city of New York, on the 10th day of February, 1873, and also interest thereon, at the rate of seven per centum per annum, payable annually on the tenth day of each February, ensuing the date hereof, untill the said principal sum shall be paid on presentation of the annexed interest warrant at said office. And it is further agreed that this obligation, and all rights and benefits arising therefrom, may be transfered by general or special endorsement, or by delivery, as if the same were a note of hand payable to bearer.

In testimony whereof, the board of supervisiors of said town have caused to be affixed its corporate seal and these presents to be subscribed by their chairman, and attested by the clerk thereof, this 21st day of May, 1853.

[L. S.] JOHN EASTERLY,
Chairman.

Attest:
M. V. PASCO, *Clerk.*

I, M. V. Pasco, clerk of the town of Beloit, do hereby certify that the following obligation is issued in pursuance of a special act of the legislature of the State of Wisconsin, entitled "An act to authorize the town of Beloit to aid in the construction of a certain railroad from the city of Racine to the village of Beloit," approved February

10th, 1853, and sanctioned by a majority of the legal voters of said town, at an election held for such purpose, April 7, 1853.

M. V. PASCO.

That the said plaintiff is the holder and owner of coupons which were attached to said bonds, of which the following are copies, and which have been duly presented at the proper time for payment at the office of said railroad company, being the Racine and Mississippi Railroad Company, in the city and State of New York, and payment thereof refused, that is to say:

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 31, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 31, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th
31 day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 32, issued to said company

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 32, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 33, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 34, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 34, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 40, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 40, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit, will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being interest due on that day on the bond of said town, number 41, issued to said town.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 41, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

32 $70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine,

Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 35, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 35, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 36, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 36, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 37, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 37, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit, will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 38, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer*.

$70. The town of Beloit, will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 38, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1855, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on pre-
33 sentation hereof, being the interest due that day on the bond of said town, number 39, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

$70. The town of Beloit will pay seventy dollars on the 10th day of February, 1856, at the office of the Racine, Janesville and Mississippi Railroad Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said town, number 39, issued to said company.

By order of the board of supervisors.

W. W. DEXTER, *Treasurer.*

And that the plaintiff is now the holder, owner, and bearer of each and every of said coupons, and that the same are due, and the said defendant refuses to pay the same, though often requested.

And also—

For that, whereas, the said defendant, on the 21st day of May, in the year one thousand eight hundred and fifty-three, at the city of Beloit, in said district, was indebted to the said plaintiff in the sum of nineteen hundred dollars, lawful money of the United States of America, for the work and labor, care and diligence of said plaintiff, by the said plaintiff, before that time done, performed, and bestowed in and about the business of the said defendant, and for the said defendant, and at the special instance and request of the said defendant, and also for divers materials, and other necessary things by the said plaintiff found, provided, used, and applied in and about that work, at the special instance and request of the said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff, the sum of money last mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of said defendant, done, performed, and bestowed divers other work and labor, care and diligence, in and about the business of said defendant, and for the said defendant, and

had before that time, found, provided, used, and applied divers other materials, and other necessary things, in and about that business, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay the said plaintiff so much money as the said plaintiff reasonably deserved to have of the said defendant, for the same, when the said defendant should be thereunto afterwards requested; and the said plaintiff aver that the said plaintiff therefore reasonably deserve to have of the said defendant for the same the further sum of nineteen hundred dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, indebted to the said plaintiff in the sum of nineteen hundred dollars, of like lawful money as aforesaid, for divers goods, wares, and merchandise, by the
34 said plaintiff before that time sold and delivered to the said defendant, and at the like request of the said defendant; and in the further sum of nineteen hundred dollars of lawful money, as aforesaid, for so much money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant; and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforsaid, accounted together with said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there found to be in arrear and indebted to the said plaintiff in the further sum of nineteen hundred dollars of like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto said plantiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, although often requested, &c., has not paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff, the said defendant has hitherto altogether refused, and still does refuse, to the damage

of the said plaintiff of two thousand dollars, and therefore the said plaintiff brings suit, &c.

CARPENTER & GRIDLEY,
Plaintiff's Attorney.

To the within defendant:

Take notice, that on the trial of this action the plaintiff will give in evidence, under the money counts of this declaration, the coupons, copies of which are contained in the first count of this declaration.

CARPENTER & GRIDLEY,
Att'ys for Pl'ff.

And afterwards, on the 8th day of January, 1861, came the defendant, by Mr. Knowlton, its attorney, and filed its plea in the words and figures following, to wit:

35 District court of the United States, for the district of Wisconsin.—January term, 1861.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT.

And the said town of Beloit comes and says, that this court ought not to have or take further cognizance of the action aforesaid, because it saith that the said the town of Beloit, is not a State of the United States of America, nor is it a citizen of the State of Wisconsin, nor is it a citizen of any other State of the United States, than the State of Wisconsin, nor is it a foreign state, nor is it a citizen, or subject of any foreign state, nor is it an ambassador or other public minister or consul, nor is it a corporation aggregate having capital stock or stockholders, nor is it any person whomsoever, a stockholder of said town of Beloit, nor can any person whomsoever become a stockholder of the said town of Beloit, but the said town of Beloit is a governmental public body, and part of the State of Wisconsin, established and continued by legislative enactment of said State of Wisconsin solely for local governmental purposes. And this the said town of Beloit is ready to verify. Wherefore it prays judgment whether this court care or will take further cognizance of the action aforesaid.

JAMES H. KNOWLTON,
Att'y for the town of Beloit.

STATE OF WISCONSIN, *Rock county, ss:*

On this seventh day of January, in the year of our Lord one thousand eighteen hundred and sixty-one, came before me, David Merrill, and made oath that he had heard read the foregoing plea of the town of Beloit and knows the contents thereof, and that said plea is true in substance and matter of fact. And further, that he was and

he is the chairman of the supervisors of the town of Beloit, in the county of Rock and State of Wisconsin.

DAVID MERRILL.

H. S. CONGER,
Com'r. Dist. Court U. S., Dist. of Wis.

I hereby certify, that in my opinion the foregoing plea of the town of Beloit is well founded.

Dated, January 7th, 1861.

JAMES H. KNOWLTON,
Att'y and counsel for the town of Beloit.

36 District court of the United States of America, for the district of Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } No. 152, Jan. term, 1861.

I, John M. Miller, clerk of the district court of the United States of America, for the district of Wisconsin, do hereby report, that in pursuance of an order of this court refering to me to ascertain and report the amount due the plaintiff, I have assessed the damages to the plaintiff at the sum of one thousand five hundred and forty dollars.

J. M. MILLER, *Clerk.*

Damages, $1,540 00.
Dated, Jan. 9th, 1861.

THE UNITED STATES OF AMERICA,
District of Wisconsin, ss:

District court of the United States of America, for the district of Wis.

Pleas before the Honorable Andrew G. Miller, judge of the district court of the United States, for the district of Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } No. 152, Jan. term, 1861. Assumpsit.

DECEMBER 22, 1860.

This day came the plaintiff, by his attorneys, Messrs. Carpenter & Gridley, and filed his præcipe for a summons in a plea of trespass on the case on promises, damages $2,000.

Whereupon a summons issued, returnable the first Monday of January next. Summons returned, and "served on the within named town of Beloit, by showing Perry Bostwick, the clerk of said town, this summons and delivering him a copy thereof, this 26th day of December, 1860. J. H. Lewis Marshal, by A. Rogers, deputy." Fees, $7 24.

DECEMBER 27, 1860.

This day came the plaintiff, by his attorneys, and filed his declaration.

JANUARY 8, 1861.

This day came the defendant, by its attorney, Mr. Knowlton, and filed its plea.

At a stated term of the district court of the United States of America, for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, on the 1st Monday (being the seven-
37 enth day) of January, A. D. 1861. Present, the Honorable Andrew G. Miller, judge of the said court, presiding.

On the third day of said term, to wit, on the ninth day of January, A. D. 1861, the following proceedings were had, to wit:

This day came the plaintiff, by his counsel, and on his motion, it is ordered by the court that the paper filed by the defendants' counsel as a plea, be and hereby is stricken from the files as a nullity, and that the default of the defendant be, and is hereby, entered for its not pleading to the plaintiff's declaration herein filed, and that it be referred to the clerk to ascertain and report what sum the plaintiff ought to recover for his damages. The clerk reported in writing that he assessed the damages to the said plaintiff at the sum of one thousand five hundred and forty dollars.

Whereupon, it is considered and adjudged by this court now here, that the said plaintiff do have and recover of the said defendant, the town of Beloit, the said sum of one thousand five hundred and forty dollars, with twenty-five dollars and seventy-four cents, his costs about his said suit in his behalf by him expended, and that he have execution therefor.

Damages	$1,540 00
Costs	25 74
	$1,565 74

Judgment roll signed January 9th, A. D. 1861.

J. M. MILLER, *Clerk.*

Exhibit No. 3.

STATE OF WISCONSIN, *Milwaukee county, ss:*

Matt. H. Carpenter, being first duly sworn on oath, days that he is the attorney of Samuel C. Morgan, in whose favor the foregoing described judgment was rendered and authorized by said Morgan to take all necessary and proper steps to collect the same. He further says that the said judgment has not been reversed, appealed from, nor removed to any other court, nor has the same been paid nor satisfied in whole or in part; that said judgment is in full force and effect, and entirely unpaid and unsatisfied.

MATT. H. CARPENTER.

Subscribed and sworn to before me, this 2d day of August, A. D. 1866.

GEO. COGSWELL,
Notary Public Mil. Co., Wis.

STATE OF WISCONSIN, *Rock county, ss:*

Lucius G. Fisher, being first duly sworn on oath, says that at the town of Beloit, in said county, on the fourth day of August, A. D. 1866, he delivered to George Morse, the town clerk of said town of Beloit, papers of which the within notice, transcript, copy of record, and affidavit, are duplicate originals, and left the same with him, and tendered him fifty cents, lawful money of the United States for filing the same, which he received then and there, and requested him to then and there file the same in his office.

LUCIUS G. FISHER.

Subscribed and sworn to before me, this fourth day of August, A. D. 1866.

R. H. MILLS,
Notary Public for State of Wisconsin.

And same day, June 3, 1867, affidavit of E. J. Smith, referred to in said petition, filed as follows:

38 *Affidavit of E. J. Smith.*

Circuit court of the United States for the district of Wisconsin.

SAMUEL C. MORGAN, plaintiff, *vs.* THE TOWN OF BELOIT, defendant. } Judgment in favor of pl'ff against defendant.

DISTRICT OF WISCONSIN,
State of Wisconsin, Rock county, ss:

E. J. Smith, being first duly sworn on oath, says that at the town of Beloit, in said county and district, on the 27th day of December, A. D. 1866, he called upon George H. Morse, who was then and there town clerk of said town of Beloit, at the request of the plaintiff in the above-described judgment, and enquired of him whether he had assessed the amount of said judgment with interest from the date of said judgment, or any part thereof, upon the taxable property of said town of Beloit; and that he, said Smith, was then and there confirmed by said Morse, town clerk as aforesaid; that he had not assessed the same, nor any part thereof, upon said taxable property, and that he had done nothing in regard to the same.

E. J. SMITH.

Subscribed and sworn to before me, this 28th day of December, A. D. 1866.

WM. P. LYON,
Circuit Judge.

Whereupon, on said 3d day of June, A. D. 1867, the court made the following order, viz ·

Rule on Egbert Gates, town clerk, to show cause, &c.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } Judgment, Jan'y 9th, 1861.

On reading and filing the petition of Samuel C. Morgan, and accompanying papers therein referred to, it is by the court now here, ordered that Egbert Gates, town clerk of the town of Beloit, show cause before said court, at the court-room of said court, in the city of Milwaukee, in said district, on the opening of said court on the 2d Monday of September next, or as soon thereafter as counsel can be heard, why a writ of peremptory mandamus should not be
39 issued out of and under the seal of said court, in due form of law, to be directed to the town clerk of said town of Beloit, strictly commanding him and his successor or successors to proceed to assess the amount of a certain judgment rendered in this court, in favor of said Morgan, against the said town of Beloit, on the 9th day of January, A. D. 1861, for the sum of fifteen hundred and forty dollars damages, and twenty-five dollars and seventy-four cents costs with interest from the date of said judgment, to the time when the warrant for the collection thereof will expire, upon the taxable property of the said town of Beloit, and place the same on the next town assessment and tax-roll of said town in a separate column; that the same proceedings may be had thereon, and the same be collected and returned in the same manner as town other taxes in said town, and be paid over in satisfaction of said judgment, or why the said writ should not be issued in some other form as the nature of the case may require; that said Egbert Gates, town clerk of said town of Beloit, show cause, as aforesaid, on said petition and papers filed therewith, and on the record of said judgment remaining in this court.

And afterwards, to wit, on the 19th day of June, A. D. 1867, a duly certified copy of said order was filed with acceptance of service thereof endorsed thereon, as follows:

"We hereby accept service of this order for Egbert Gates, town clerk of Beloit, June 7, 1867.

"PALMER & HOOKER,
"*Att'ys for Defendants.*"

Afterwards, to wit, on the 29th day of June, A. D. 1867, the following notice and affidavit was filed by plaintiff, to wit:

Notice for amendment of papers.

Circuit court of the United States, for the district of Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT.

To Messrs. Palmer & Hooker, attorneys for Egbert Gates, town clerk of the town of Beloit:

Please take notice, that on the opening of the court, at the court-room, in the city of Milwaukee, in said district, on the morning of the second Monday of September next, 1867, or as soon thereafter as counsel can be heard, the plaintiff will move said court for leave to amend the papers on which the rule on Egbert Gates, town clerk of said town, to show cause in this action was issued, by adding thereto an affidavit of Matt. H. Carpenter, a copy of which is hereto attached and herewith served on you.

Dated June 27th, A. D. 1867.

MATT. H. CARPENTER,
Att'y for Plaintiff.

Affidavit of Matt. H. Carpenter.

Circuit court of the United States for the district of Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT.

DISTRICT OF WISCONSIN, *ss:*

Matt. H. Carpenter, being first duly sworn on oath, says that he is informed and believes, and thereupon says, that at the last election of town officers for said town of Beloit, Charles Peck was elected chairman of the board of supervisors of said town, and qualified according to law; that Simon Ruble and Clark Nye were duly then and there elected supervisors of said town, but that both neglected to qualify; that since the decision of this court that no mandamus could issue to enforce the payment of this judgment to the board of supervisors of said town to compel taxation, when two of said members had resigned, or there were two vacancies in said board, there has not been a board of supervisors of said town qualified to act, and is not at present; and that at each annual election two men are elected with the understanding that they are not to qualify, for the purpose of not having a legally qualified board of supervisors of said town.

MATT. H. CARPENTER.

Subscribed and sworn to before me, this 28th day of June, A. D. 1867.

FRED. RIETBROCK,
Notary Public, Milwaukee Co., Wis.

Endorsed: "We admit service of a copy of the within notice and affidavit, this 28th day of June, A. D. 1867. Palmer & Hooker."

4 At a stated term of the circuit court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, on the second Monday (being the ninth day) of September, A. D. 1867. Present, the Honorable Andrew G. Miller, district judge, presiding.

On the first day of said term, to wit, on the ninth day of September, A. D. 1867, the following proceedings were had, to wit:

Motion to vacate rule on Egbert Gates.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } At law.

This day came the defendant, by its counsel, and moved the court to vacate, set aside, and discharge the rule made herein on the third day of June, A. D. 1867, to show cause why a peremptory writ of mandamus should not be issued, which motion is as follows:

Circuit court of the United States for the district of Wisconsin.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT.

And now comes the said respondent above named, by Palmer & Hooker, his attorneys, and moves the court now here to vacate, set aside, and discharge the rule made herein on the third day of June, A. D. 1867, on the said respondent, to show cause why a peremptory writ of mandamus should not be issued herein as prayed, for the reason that the relation, affidavits, and papers upon which such rule is founded do not state facts sufficient to entitle the relator to the relief sought, and particularly for the following reasons:

1. That the said relation, affidavits, and papers annexed, fail to show any reason why the relator does not, as he ought to do, avail himself of the remedies provided in the act authorizing the issuing of the bonds and coupons in said relation mentioned.

2. Because it does not appear from the said relation, affidavits, and papers thereto annexed, that any demand has been made of the respondent to perform the duty sought to be enforced, or that he has refused, or intends to refuse its performance.

42 3. Because, by the law of the State, the relator is bound to pursue the remedies provided in the act authorizing the issue of said bonds in the said relation mentioned. And it does not appear that such remedies have been exhausted, failed, or would not be effective.

Which motion will be founded upon the relation and the affidavit and papers thereto annexed, copies of which were served by the relator with such rule.

Milwaukee, September 9th, 1867.

PALMER & HOOKER,
Attorneys for Respondent.

And afterwards, to wit, on the eleventh day of said term, to wit, on the 20th day of September, A. D. 1867, the following proceedings were had, to wit:

Amendment of papers.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } At law.

This day came the plaintiff, by his counsel, and by leave of the court amended the papers on which the rule on Egbert Gates, town clerk, to show cause was issued, by adding thereto an affidavit of Matt H. Carpenter, filed June 29, 1867.

Hearing of rule and motion to vacate.

And the said rule, and the motion to vacate the same, came on to be heard, and was argued by Mr. Carpenter for the plaintiff, and by Mr. Palmer for the defendant, when the court took the same under advisement.

And afterwards, to wit, on the nineteenth day of said term, to wit, on the first day of October, A. D. 1867, the following were had, to wit:

Order vacating rule and denying mandamus.

SAMUEL C. MORGAN
vs.
THE TOWN OF BELOIT. } At law.

This day came the parties, by their counsel, and on consideration of the motion on the part of the defendant to vacate the order of this court, made June 3, 1867, for a rule on the town clerk of the town of Beloit, to show cause why a writ of mandamus should not be issued against him, it is ordered by the court that the said order, be, and hereby is, vacated.

OCTOBER 11, 1867.

Petition of plaintiff for a writ of error filed, as follows:

43 *Petition for writ of error.*

Circuit court of the United States for the district of Wisconsin.

THE UNITED STATES OF AMERICA, *ex. rel.*
Samuel C. Morgan,
vs.
EGBERT GATES, town clerk of the town of
Beloit.

To the Hon. Andrew G. Miller, district judge of the United States for the district of Wisconsin:

The undersigned, Samuel C. Morgan, respectfully represents, that he is aggrieved by the order of the said circuit court, made on the

first day of October, A. D. 1867, denying the motion of your petitioner for a peremptory writ of mandamus, to be directed to the said Egbert Gates, town clerk of the town of Beloit, commanding him to assess the amount of a certain judgment recovered by your petitioner against the town of Beloit by the judgment of this court, on the 9th day of January, A. D. 1861, on which judgment there was due on the said first day of October, A. D. 1867, over two thousand dollars, exclusive of costs; and your petitioner prays your honor to allow and grant a writ of error from said order or judgment, denying said mandamus, to the Supreme Court of the United States, according to law; and herewith offers to your honor a cost bond in the penal sum of five hundred dollars for your approval.

SAMUEL C. MORGAN,
By MATT. H. CARPENTER,
His Attorney.

And same day, (October 11, 1867,) bond of Matt. H. Carpenter and J. A. Noonan, on the part of the plaintiff, Samuel C. Morgan, dated October 10, 1867, in the penalty of five hundred dollars, conditioned to prosecute a writ of error to effect and pay all damages and costs, &c., to Egbert Gates, town clerk of the town of Beloit, approved by the district judge, filed.

Which bond is as follows, to wit:

44 *Bond for costs on writ of error.*

The circuit court of the United States for the district of Wisconsin.

Know all men by these presents, that we, Matt. H. Carpenter and Josiah A. Noonan, are held and firmly bound unto Egbert Gates, town clerk of the town of Beloit, in the penal sum of five hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made to the said Gates, his successors or assigns, executors or administrators, we hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals, this 10th day of October, A. D. 1867.

The condition of this obligation is this: Whereas, Samuel C. Morgan has prayed the allowance of a writ of error to the Supreme Court of the United States, from the order or judgment of the circuit court of the United States for the district of Wisconsin, denying a peremptory writ of mandamus on the application of said Morgan in that behalf, to be directed to the said Egbert Gates, town clerk of the town of Beloit, commanding him to assess the amount of a certain judgment recovered by the said Morgan against the town of Beloit, on the 9th day of January, A. D. 1861, on which there was due, exclusive of costs, at the time said order or judgment denying said writ was made, over two thousand dollars. Now the condition of this obligation is this: if said Morgan shall make good said writ of error,

or pay all damages and costs that may be adjudged or decreed against him, if he fail to to make the same good, then this bond to be void.

Dated October 10, 1867.

MATT. H. CARPENTER. [SEAL.]
J. A. NOONAN. [SEAL.]

Endorsed: Oct. 11, 1867. This bond appproved.

A. G. MILLER,
District Judge.

DITSRICT OF WISCONSIN,
State of Wisconsin, ss:

Matt. H. Carpenter and J. A. Noonan, being first duly sworn on oath, each for himself, says that he is worth five hundred dollars over and above all debts and liabilities and exemptions of property from forced sale on execution.

MATT. H. CARPENTER.
J. A. NOONAN.

Subscribed and sworn to before me, this 10th day of October, 1867.

GEO. COGSWELL,
Notory Public in and for the State of Wisconsin, residing in Milwaukee County.

Whereupon, a writ of error and citation issued and copy of writ of error lodged for defendant in error.

45 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America, for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof, now on file, and remaining of record in my office, being a full and complete exemplification of the record and proceedings in the suit of Samuel C. Morgan *vs.* The town of Beloit, commenced Dec. 22, 1860.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this 21st day October, in the year of Lord one thousand eight hundred and sixty-seven, and of the independence of the said United States the ninety-second.

[SEAL.] EDWARD KURTZ, *Clerk.*

46 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America, for the district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said circuit court of the

United States of America, for the district of Wisconsin, before you, between the United States of America, *ex rel.* Samuel C. Morgan, plaintiff, and Egbert Gates, town clerk of the town of Beloit, defendant, a manifest error hath happened, to the great damage of the said Samuel C. Morgan, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States this eleventh day of Ootober, in the year of our Lord one thousand eight hundred and sixty seven, and of the independence of the United States, the ninety-second.

[SEAL.] EDWARD KURTZ, *Clerk.*

47 The United States of America to Egbert Gates, town clerk of the town of Beloit.

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be held at the city of Washington, on the first Monday of December next, pursuant to a writ of error, in a cause in the circuit court of the United States of America for the district of Wisconsin, wherein the United States, *ex rel.* Samuel C. Morgan, is plaintiff, and you are respondent, to show cause, if any there be, why the judgment rendered in the said cause should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this eleventh day of October, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the 92d.

A. G. MILLER, *District Judge.*

We hereby admit service of this citation for the said respondents, and enter our appearance for him in the said Supreme Court.

Dated October 11, 1867.

PALMER & HOOKER,
Counsel, & Att'ys for Respondents.

[illegible] OF THE UNITED STATES.

[illegible] Term 1868.

No. 118.

Samuel C. Morgan,

Plaintiff in Error,

vs.

[illegible]ghers Gates, Town Clerk of the Town of Beloit

Brief for Plaintiff in error.

MATT. H. CARPENTER,

Counsel.

[illegible] Law Printing, Milwaukee.

SUPREME COURT OF THE UNITED STATES.

December Term 1868.

No. 118.

SAMUEL C. MORGAN vs. THE TOWN OF BELOIT. } MOTION FOR MANDAMUS ON TOWN CLERK TO LEVY A TAX, &c.

Judgment docketed January 9, 1861.

Damages, - - - - - - -	$1540 00
Costs, - - - - - - - -	25 74
	$1565 74

This judgment was rendered, as the record shows, on interest coupons issued by the town, to pay a subscription of stock of the Racine, Janesville and Mississippi Railroad Company, under and in pursuance of chapter 12, Private and Local Laws of Wiscensin, 1853.

This act provides as follows :

"Sec. 2. The shares of stock in said railroad company "thus taken by said town, and all dividends arising from "the same, are hereby irrevocably pledged for the pay- "ment of the principal and interest of said bonds, &c.

"Sec. 3. The Board of Supervisors of the town of Be- "loit, whenever the same shall become necessary, *shall* "*annually* levy a tax upon the taxable property of said

"town, sufficient to pay the interest upon such bonds, "after deducting the dividends due to such town on said "shares of stock."

From February, 1855, to the rendition of this judgment, six years had elapsed and no provision whatever had been made for the payment of any interest maturing on any of these bonds.

Since obtaining judgment, the plaintiff has sought, in vain, the following remedies, viz :

January 16, 1862.—Two years after the rendition of the judgment, the plaiutiff obtained a peremptory writ of *mandamus* upon the board of Supervisors of the town commanding them to levy a tax to pay the judgment; which remains in full force, but wholly ineffectual for the reason that there has since been no legal board of Supervisors to obey the writ.

January 12, 1863.—The plaintiff applied for an attachment against the Chairman of the Board, which was denied, on the ground that he was the only Supervisor in office, and could not levy the tax alone.

May 7, 1863. . . The plaintiff, after another election, obtained a rule on the new board to show cause why a mandamus should not issue to them. They answered that there was still but one Supervisor in office ; and

The rule was discharged.

The plaintiff then—and after another annual election—sought relief on this judgment in the Supreme Court of the state, by praying a mandamus to the Board of Supervisors to levy a tax. On a motion to dismiss, in the nature of a demurrer, that Court delivered an opinion in favor of the plaintiff; then the answer set up another vacancy of a majority of the board and the Court delivered its opinion that the writ must be denied for that reason. The two opinions are as follows:

FIRST OPINION.

SUPREME COURT.
The State of Wisconsin,
ex. rel. Samuel C. Morgan,
vs.
The Supervisors of the town
of Beloit, &c.

* * * * * * * * * *

"The judgments mentioned in the first two applications "were obtained in the District Court of the United "States, and it is insisted that no mandamus to enforce "them can properly issue from the State Courts. This "objection has already been overruled in Soutter vs. The "City of Madison, 15 Wis. 30, and need not be further con-"sidered. It is very evident that the authorities of the "town of Beloit cannot on these applications, question "the validity of the bonds and coupons upon which the "judgments were rendered. Whether the city is in any

"different attitude we need not stop to determine. But "clearly the town having had a full and ample op- "portunity to raise all such questions, and in fact after "having once presented them to the cousideration of the "court must now be estopped by the decision of them. "See the case of Bushnell vs. Beloit, 10 Wis., 195, where "many points raised upon the argument of this motion "were directly overruled. And this brings us to the "main question, whether the applications make a good "case for issuing a mandamus requiring the town authori- "ties to proceed and levy a tax to pay these judgments. "That question in principle has already been decided by "this Court. Soutter vs. The City of Madison, *supra*; "State ex. rel. Van Vliet vs. Wilson *et. al.*, 17 Wis., 687. "By the law under which these bonds were issued it "was made the duty of the Board of Supervisors of the "town of Beloit, whenever it should be necessary, to "annually levy a tax upon the taxable property of the "town, sufficient to pay the interest on such bonds, after "deducting the dividends due to such town on its shares "of stock. S. 3, Chap. 12, Private Laws, 1853. Here is "a clear, distinct and specified duty imposed by law up- "on the Boar l of Supervisors of the town, and no reason "has been suggested why they should not perform it. "And if the Supervisors wholly neglect to make any "provision for paying the interest as it falls due, by "levying a tax, no principle of law is better settled than "that they may be compelled to perform this duty by "mandamus. See the anthorities referred to in The Com- "monweath *ex. rel.* Thomas vs. The Commissioners of "Allegany Co., 32 Penn. S. R. 218; Commonwealth *ex.* "*rel.* Hamilton vs. Select and Common Council of Pitts-

"burg, 34 do., 496; Commonwealth *ex. rel.* Middleton "vs. Commissioners Allegany Co., 37 do., 237. It is "suggested that if the writ goes at all it should be to "compel the board to assess and collect a sufficient "amount to pay the interest upon all the bonds, so that "each holder may not have to institute proceedings for "himself, thus subjecting the town to a multiplicity of "suits. There is certainly great force in this view, and "if deemed correct, the writ, should it be granted, can "be so framed.

"But, again, it is said that the rule against the town "should be discharged because the applications show that "a vacancy exists in the Board of Supervisors—the "chairman of the board only having qualified—and "therefore the writ would be nugatory, as there is no "power in any body to properly execute it. Whether "the three Supervisors of the town can alone perform "the duty of levying the tax for the payment of the inter- "est due upon the bonds, is a question we will not decide "upon this motion. A demand was made for the pay- "ment of two of the judgments when the board was full, "and it may be very questionable whether the Supervi- "sors can shirk their responsibility, or evade their duty "by resignation or a refusal to qualify when elected. "But, however this may be be, we do not think the rule "against the town should be discharged for anything "appearing in the applications.

"It follows from our views that the motion to discharge "the rule so far as the City is concerned is granted, and "denied as to the town."

SECOND OPINION.

SUPREME COURT.

State of Wisconsin, *ex. rel.*, Samuel C. Morgan,

vs.

The Supervisors of the Town of Beloit.

"It is of the very essence of this proceeding that "there be some officer or officers in being having the "power, and whose duty it is to perform the act.

"If there be no such officers it is obvious that the "writ cannot go, nor the mandate of the Court be en- "forced.

"It is conceded that the chairman alone cannot levy "the taxes; but it is claimed that the other two persons "elected but who neglected to qualify, became supervi- "sors *de facto* by virtue of such election, and can be "compelled to act as such in the performance of the du- "ty enjoined by the writ. To this point the case of "*Coles County v. Allison* 23 Ill., 437 is cited. That case "holds no more than this, that the acts of officers *de facto* "are valid as respects the public and third persons hav- "ing an interest in them and that they cannot be collat- "erally impeached. The trustees there elected at the "second election, though irregularly perhaps, were held "to be officers *de facto*, inasmuch as they had, in the lan- "guage of the report, 'qualified and ever since exercised "the functions of their office.' That was sufficient in "the opinion of the Court to show a valid organization "of the town. In this case, however, the other two sup-

"ervisors elected not only failed to qualify, but it does "not appear that they have ever assumed to act as such "in any manner whatever.

"The statute declares that every office shall become "vacant on the refusal or neglect of the incumbent to "take his oath of office, or to give or renew his official "bond, or to deposit such oath or bond within the time "prescribed by law. R. S. c 14--2.

"The other two persons elected are, therefore neither "supervisors *de jure* nor *de facto* and the offices are va-"cant.

"It is likewise insisted that under sec. 53, chap. 15 "R. S. as amended by chapter 70 Laws of 1861, the "chairman together with the town clerk has the power "to fill the vacancies, and that it is the duty of the "chairman to see that the offices are so filled, instead of "answering that they are vacant. The statute does not "authorize the filling of the offices by such appointment "when there is more than one vacancy. The language "is that 'the remaining supervisors together with the "town clerk shall have power,' to fill any vacancy which "shall occur in the board of supervisors.

"It is also suggested that the chairman may call to "his assistance two justices of the peace of the town so "as to constitute a board under the provisions of sec. 79 "of chap. 15, R. S.

"The board thus organized is an auditing board to ad-"just accounts payable by the town, and has no power "to perform such general acts as the levying of taxes. "Peremptory writ refused."

From these decisions of this Court and the Supreme Court of our State, construing the Statutes of Wisconsin,

it is apparent that the plaintiff has exhausted his remedy as against the Board of Supervisors.

After this the Plaintiff exhibited his bill of complaint on the equity side of this Court against the town, and certain property owners and tax payers of said town, setting up the judgment, and proceedings that had been had against the board of supervisors, and showing that that remedy had been exhausted ; and that the inhabitants of the town under the advice of counsel, each year elected persons to the office of Supervisors, who were known to be unfriendly to the payment of said judgment, and with the understanding that they should not qualify, and that no board had been in existence for several years ; describing the property of the defendants tax payers and praying satisfaction of the judgment by sale of said property. To this bill the defendants demurred, and insisted in argument that a complete remedy was given by the State statute providing for a levy of a tax by the town clerk to satisfy the judgment, which could be compelled by *mandamus ;* thereupon this Court sustained the demurrer and dismissed the bill.

The plaintiff now seeks the remedy, which counsel opposed, insisted on the argument of the demurrer to the bill in equity was open to him ; and which the Court must have thought was applicable to the case, for otherwise the bill in equity would have been sustained upon the ground that the plaintiff had no remedy at law.

The town clerk having neglected to levy the tax when properly requested so to do, the plaintiff now seeks by *mandamus* to compel him to assess a tax to pay said judgment ; and rests his claim to this relief upon the following statute of Wisconsin, which he claims has been adopted

by acts of Congress, and rules of this court in pursuance thereof, and which counsel opposed insisted on the former argument was the proper remedy. The statute is as follows:

Chap. 15, sec. 77. "No execution shall issue on any "judgment against a town, nor shall any action be "brought thereon; but the same shall be collected in "the manner hereinafter provided in this chapter.

"Sec. 78. Whenever an exemplified copy of any final "judgment, rendered by any court of this state, against "any town in this state, together with an affidavit of the "plaintiff in such judgment, his assigns, or his attorney, "stating that said judgment has not been reversed, ap-"pealed from, or removed to any other court, or paid, or "satisfied in whole or in part, shall be filed in the office "of the town clerk of the town against which such judg-"ment may have been rendered, it shall be the duty of "the town clerk with whom the certificate of the judg-"ment as aforesaid shall have been filed, to proceed to "assess the amount thereof, with interest from the date "of such judgment to the time when the warrant for the "collection thereof will expire, upon the taxable prop-"erty of said town, placing the same on the next town "assessment and tax roll, in a separate column; and the "same proceedings shall be had thereon, and the same "shall be collected and returned in the same manner as "other town taxes, and shall be paid to the party enti-"tled thereto."

R. S. 1858, p. 186.

This act was first passed by the Legislature of Wisconsin, April 16, 1857.

Gen. Laws 1857, p. 35.

The papers show that a transcript and a full exemplification of the record, and affidavit as required by this statute, were filed with the town clerk, on the day of A. D. 1866; that the town clerk has neglected to assess the judgment under the act; and that at the last spring's election, three supervisors were duly elected, and two of them refused to qualify; thus continuing the obstacle in the way of any remedy as against the board of supervisors.

I.

The judiciary act of 1789, section 14, gave all courts of the United States power to issue executions on their judgments. 10 Wheat., 23.

The process act of 1789—1 St at large, 93—provides, sec. 1, "That all writs and *processes* issuing from a supreme "or a circuit court, shall bear tests," &c.

Sec. 2. "That until further provision shall be made, "&c., the forms of writs and executions, except their "style, *and modes of process* and rates of fees, except &c., "shall be the same in each state respectively as are now "used or allowed in the supreme courts of the same. "And the forms and *modes of proceedings*, in causes of "equity, and of admiralty and maritime jurisdiction, "shall be according to the course of the civil law," &c.

Upon this section, the Supreme Court of the United States, 10 Wheat., 27, speaking of the words "*and modes of process*," say: "They have a meaning, and ought to be "allowed an operation, more extensive than the preceding words. The term is applicable to writs and execu-

"tions, *but it is also* applicable *to every step taken in a* "*cause.* It indicates *the progressive course of the business* "*from its commencement to its termination*; and *modes of* "*process* may be considered as equivalent to *modes or man-* "*ner of proceeding.*"

This act remained in force until 1793, when a permanent act was passed as follows: 1 St. at large, 275.

Sec. 1. That all writs and *processes* issuing, &c., shall bear tests, &c.

Sec. 2. "That the forms of writs, executions and other "process, except their style, and the forms *and modes of* "*proceeding* in suits in those of common law shall be the "same as are now used in the said courts respectively in "pursuance of the act 'an act to regulate processes in the "'courts of the United States,' &c., *subject however to such* "*alterations and additions as the said courts respectively shall* "*in their discretion deem expedient*, or to such regulations "as the Supreme Court of the United States shall think "proper from time to time *by rule* to prescribe to any "circuit or district court concerning the same."

The Supreme Court, 10 Wheat, 32, speaking of this act say:

"It is impossible to confound 'the forms of writs, exe- "'cutions and other process,' which are to be attested by "a judge, and to be under the seal of the court from "which they issue, with '*the forms and modes of proceeding* "'*in suits.*' They are distinct subjects. The first des- "cribes the paper which issues from the Court, and is an "authority to the officer to do that which it commands; "*the last embraces the whole progress of the suit, and every* "*transaction in it, from its commencement to its terminat on,* "*which has been already shown not to take place until the*

"*judgment shall be satisfied.*" * * * * "This "provision enabled the several courts of the Union *to* "*make such improvements* in its forms and *modes of proceed-* "*ing*, as experience may suggest, *and especially to adopt* "*such state laws on this subject as might vary to advantage* "*the forms and modes of proceeding which prevailed in Sep-* "*tember*, 1789."

See also U. S. Bank v. Halstead, 10 Wheat., 58, 59.
Beers v. Houghton, 9 Peters, 359
Ross v. Duval, 13 Peters, 63, 64.

Chap. 68, 1828—4 St. at large, 278, provides "That "the forms of mesne process, except the style, *and the* "*forms and modes of proceeding in suits* in the courts of the "United States, held in those states admitted into the "Union since the 29th day of September, 1789, in those "of common law, shall be the same in each of the said "states respectively, as are *now* used in the highest "court" of the state, &c., 'subject however to such *altera-* "*ations* and *additions* as the said courts of the United "States shall, respectively, in their discretion, deem ex- "pedient, or to sach rules as the Supreme Court, &c.

Sec. 3. "That writs of execution and other final pro- "cess issued on judgments and decrees, rendered in any "of the courts of the United States, and the *proceedings* "*thereupon* shall be the same, except their style, in each "state respectively, *as are now used* in the courts of such "state," &c. "Provided however, that it shall be in the "power of the courts, if they see fit in their discretion, "*by rules of court*, so far to alter final process in said courts "as to conform the same to any change which may be "adopted by the legislatures of the respective states for "the state courts."

This statute has received construction by the Supreme Court of the United States which throws light upon all the other statutes upon the subject.

In *Gwin vs. Breedlove*, 2 *How*. 29, it was held that a statute of the state of Mississippi passed in Feb'y, 1828, providing that if a sheriff should fail to pay over to the plaintiff money collected by execution, jndgment might be recovered therefor against the sheriff, on motion before the court to which such execution was returnable, was applicable to the marshal, and such judgment rendered on motion in the United States Circuit Court for the Southern District of Mississippi, was affirmed by the Supreme Court. The Court say :

"We think that Congress intended by the new process "act of 1828, to add the cumulative remedies, then exist- "ing by statute in the new states, where they could be "made to apply, because they were more familiar to the "Courts and Country, and better adapted to the certain "and speedy administration of justice. In our opinion, "the act of Mississippi authorizing a judgment by motion, "against a sheriff for failing to pay over moneys collected "on execution, to the party on demand, or into Court at "the return day, was adopted by the act of 1828, and "does apply in a case like the present, *as a mode of pro-* "*ceeding* in the Courts of the United States, held in the "district of Mississippi ; and could be enforced against "the marshal in like manner as it could be against a "sheriff in a State Court."

II.

The Circuit Court of the United States for the district of Wisconsin, has the same power that all other Circuit Courts of the United States have, to adopt "the forms and modes of proceeding" in force in the state courts, and to make from time to time, such "alterations and additions" thereto, as it "deems expedient."

In the exercise of this undoubted power, this Court has by rule, after providing for the action of ejectment, provided for all other cases, by rule 10 of "Writs and Process," as follows:

"Suits by replevin or other process not specified in "these rules shall be commenced *and proceeded in* as regu- "lated at the time, by the laws of the state, subject to "the rules of process and pleadings in this court."

This rule having been adopted long after the decision of the Supreme Court in Wayman v. Southard, 10 Wheaton, 32, construing similar language in the statute to "em- "brace the whole progress of the suit, and every trans- "action in it, from its commencement to its termination "which has been already shown not to take place *until* "*the judgment shall be satisfied*," must be deemed to have been adopted for the express purpose of accomplishing the same result in suits in this Court. The rule therefore adopts the proceeding in question for the collection of a judgment against a town.

III.

The *mandamus* may be issued by a Court of the United States to an officer of the state.

Comr's. Knox Co. vs. Aspenwall 24, *How.* 376.

IV.

The practice pursued in this case is the same as that in the case last above cited. No alternative writ is necessary ; the notice gives the party ample opportunity to resist the issuance of the writ, and this is the only office of an alternative writ.

Com. Knox Co. vs. Aspenwall 24 How. 376.

Besides, this practice in *mandamus* cases, to proceed by motion and notice, or rule to show cause is proper practice in the State Courts, and is therefore adopted as the practice of this Court, as showu above.

State v. Taylor, 19 *Wis.* 566.

V.

The office of town clerk is a continuing one by our law, though held at different times by different individuals. The duties to be performed pertain to the office, not the officer. The town clerk previous to the assessment of taxes in 1866, was requested to levy this tax. This he neglected to do.

It is objected that this *mandamus* cannot be granted because the individual at present holding the office, has not neglected to levy a tax. If this be a sound objection, it amounts to a repeal of the statute. It cannot legally be known, that this individual officer will not perform this duty until the time for its performance is passed ; and then he cannot be compelled to do so until another annual assessment. In the mean time the town will do, what they did in this instance, elect another individual, who cannot be compelled for the same reason,

and so on forever. But this objection is expressly overruled by

Soutter vs. Mayor, &c., of Madison, 15 *Wis.*, 37.
Peo. vs. Collins, 19 *Wend.*, 56, 68.

VI.

The learned District Judge, holding the court below, denied this *mandamus*, upon the ground that inasmuch as the act under which the bonds were issued provided for the levying of taxes by the supervisors, that was exclusive of all other remedies.

But it is submitted, that the objection, if it could ever be taken, comes too late after judgment on the coupons has been rendered. If the town had a right to insist that the bondholder should confine himself to the single remedy provided by the act, the objection should have been raised when the bondholder sought another remedy by action at law. It must be presumed here, that the objection if made was overruled ; if not made it was waived. This has been so ruled by the supreme court of the state of Wisconsin.

In Bushnell v. Gates, in supreme court of the state of Wisconsin, the same objection was made, and was overruled, and the mandamus was granted.

The opinion was as follows :

"The mandamus should have been granted by the "circuit court. The case presented, was clearly within "the provisions of Section 77 and 78 of Chap. 15, of "the revised statutes, which makes it the specific duty "of the clerk to assess upon the taxable property of the "town a tax sufficient to pay the judgment.

"It is said that the relator had another remedy. But "it appears that the other remedy suggested, would have "been substantially the same one he now seeks; that is "a mandamus to compel the assessment and collection of "a tax, to pay the amount due him. The law under "which the bonds were issued upon the coupons, of "which the judgment was recovered, required the assess- "ment of a tax to pay the interest. Undoubtedly the "owner might have compelled such assessment without "recovering a judgment.

"If that right furnished any reason why he should "not be entitled to an action against the town, and to "recover a judgment on the coupons, that reason should "have been urged when such an action was brought. "Not having been urged, or if urged, having been over- "ruled, and a judgment having been rendered and sus- "tained by this Court, it cannot, whether right or wrong, "now be reviewed in this proceeding, but must be taken "to be a good and valid judgment for all purposes. If "so, the law is as explicit requiring a tax to be assessed "to pay the judgment as it was requiring one to pay the "coupons.

"And if the proper officers refuse to assess it, it is "difficult to see upon what principle the appropriate "remedy could be denied.

"The objection so far as it had any force, went to the "parties' right to recover judgment at all.

"But after judgment has been recovered it is too late "to urge it, whatever effect it might otherwise have been "entitled to. The reason of it no longer exists. The "coupons have been merged in the judgment, and if any "tax at all is assessed, it must now be assessed to pay

"the judgment, and not to pay the coupons, and to sus-
"tain this objection now, would be to deny the remedy
"altogether. It seems the papers laying the foundation
"for this application were served on the predecessor in
"office of the respondent. It may be that in such cases,
"in proceeding to charge a party personally with con-
"tempt, some notice or request should be first served
"upon him, and that he ought not to be so charged upon
"the strength of proceedings taken against his predeces-
"sor, of which he may in fact have had no knowledge.
"But so far as the advancement of the principal reme-
"dy is concerned, it is to be regarded as a proceeding
"against the officer and not against the individual, and
"when proper process has once served upon the
"officer, any proceeding which they warrant may be
"taken against his successor, without commencing *de*
"*novo*. This rule is essential to the due administration
"of justice, which might otherwise be baffled by the
"regular changes in office, or defeated by resignations
"made for the very purpose of destroying proceedings
"already commenced. *Soutter v. Madison*, 15 Wis., 37.
"Graham *et. al.*, v. The City of Mayville, *et. al.*, 6 Amer.
"Law Reg., 626-7. We see no reason why the writ
"should not have been granted. The order discharging
"the rule to show cause, is overruled with costs, and the
"cause remanded with directions to grant the motion of
"the relator."

Although the bondholder had a right under the law which provided for the issue of these bonds, to apply to the court for a *mandamus* against the board of supervisors of the town to compel taxation upon the maturity of his coupons, and without seeking a judgment, he was

not bound to this course; but might, as he did in this instance, bring suit and recover judgment at law. This is supposed to be settled by the fact that this judgment was rendered. The "unfortunate," standing in the stocks, was wholly unable to believe that *he could not be put there*; and the fact that this judgment was rendered on these coupons, is regarded as equally conclusive to show *that such judgment can be rendered*.

Bushnell v. Beloit, 10 *Wis*, 195.

When the judgment is rendered, whether rightly or wrongfully, it is to be enforced; and the statute has provided that no execution shall issue "on *any* judgment against a town," but that on receiving transcript, affidavit &c., the clerk shall assess a tax to pay the judgment.

The objection taken by the learned counsel opposed, that the remedy given by the act, the levy of the tax by the board of supervisors, *is exclusive of all other remedies*, comes too late. It should have been interposed when the plaintiff *sought* another remedy, by this action at law. The objection in substance is, that no action to recover judgment on these coupons, can be maintained. If the judgment can be recovered, and this has been, then it is no objection to its enforcement, that it ought not to have been rendered. The defendant, the town, has had its day in court upon that question, and has left defeated and *disgusted*.

The plaintiff has fully exhausted his remedy as against the board of supervisors under the act authorizing the issue of these bonds; and that the court below has decided that on the state of facts shown by the papers in this case, no relief can be had in that direction.

The fact is, the bondholder may pursue either of three courses, to recover his interest :

1. He may apply to the court, on the maturity of his coupon, without obtaining judgment, for a *mandamus* to compel taxation under the act :

Com. v. Allegany Co. 32, *Penn. St.* 218.
Com v. Pittsburgh, 34 *Penn. St.* 496.

2. He may recover judgment on his coupons, and then apply to the court, using his judgment only as evidence of the non-payment of his interest, and obtain *mandamus* to compel taxation under the original act, as he might have done without obtaining judgment.

Soutter v. Madison, 15 *Wis.* 37.
Havemyer v. Mineral Point—Not reported.
Ward v. Sheboygan County—Not reported.

Or 3. He may, after obtaining judgment at law, enforce his judgment by execution or otherwise as the law may regulate the enforcement of judgments, without regard to the cause of action upon which it was rendered.

These various proceedings are cumulative remedies, and the party may pursue either.

Anderson v. Hooks, 9 *Ala.* 704.

A mortgagee with mortgage containing power of sale, may exercise the power, or waive it and go into equity to foreclose his mortgage. The power of sale is an additional weapon in the hands of the creditor, not a shield to the debtor. So here the creditor may pursue either or all these remedies until he obtain one satisfaction.

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Of Counsel.